Supreme Court, U.S.
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In The

Supreme Court of the United States

OCTOBER TERM, 1994

ANTHONY DANIEL,

Petitioner,

v.

CITY OF TAMPA, FLORIDA;
AUDLEY EVANS, Executive Director,
Tampa Housing Authority,
in his official capacity,

Respondents.

On Petition For a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Eleventh Circuit err in creating an exception, limited only to residents of public housing, to the reciprocal First Amendment rights exercised in residential canvassing and leafletting?

2. Did the Eleventh Circuit err, in applying standard public forum analysis to communicative activities in public housing, by failing to consider the First Amendment right of residents, as opposed to the government, to decide whether to welcome residential canvassers and leafletters, as established in ***Martin v. Struthers***, 319 U.S. 141 (1943)?

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Petitioner Anthony Daniel respectfully petitions for a writ of certiorari to review the judgment and opinion of the Eleventh Circuit in this case.

OPINIONS AND ORDERS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported as *Daniel v. City of Tampa*, 38 F.3d 546 (11th Cir. 1994), and reproduced in Appendix A, *infra*. Petitioner filed a suggestion for rehearing en banc, which was denied in an unpublished opinion reproduced in Appendix D, *infra*. The memorandum opinion of the district court granting respondents' motion for judgment as a matter of law is reported as *Daniel v. City of Tampa*, 843 F.Supp. 1445 (M.D. Fla. 1993), and reproduced in Appendix B, *infra*. The district court's prior order on report and recommendation, granting petitioner's motion for preliminary injunction, is reported as *Daniel v. City of Tampa*, 818 F.Supp. 1491 (M.D. Fla. 1993), and reproduced in Appendix C, *infra*.

JURISDICTION

The jurisdiction of this Court to review the judgment of the United States Court of Appeals for the Eleventh Circuit by writ of certiorari is invoked under 28 U.S.C. Section 1254(1). On January 20, 1995, the Court of Appeals denied petitioner's suggestion for rehearing en banc and incorporated petition for rehearing. This petition is thus timely filed within ninety days of that date as required by 28 U.S.C. Section 2101(c); Sup.Ct.R. 12, 13.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution states, in pertinent part, that, "Congress shall make no law...abridging the freedom of speech...or the right of the people peaceably to assemble, and to petition the Government for redress of grievances." In pertinent part, 42 U.S.C. Section 1983 provides that,

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State sub-

> jects or causes to be subjected, any citizen of the United States...to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress....

STATEMENT OF THE CASE

A. How the Federal Question was Presented

The jurisdiction of the district court was invoked under 28 U.S.C. Section 1331.

B. Statement of Facts

Anthony M. Daniel is a political activist in Tampa's African-American community. He engages in a wide variety of political organizing techniques, including picketing, distributing leaflets, and canvassing door-to-door. Mr. Daniel is a member of the National Peoples' Democratic Uhuru Movement, a black rights organization dealing primarily with the abrogation of the democratic and constitutional rights of poor and working class African-American people. *Daniel v. City of Tampa*, 818 F.Supp. at 1492.

In 1991, Mr. Daniel was arrested on three separate occasions while present in public housing complexes administered by the Tampa Housing Authority. (Technically, on the first occasion he was cited but was not arrested at that time.) Members of the Tampa Police Department's "X-Ray Squad," assigned exclusively to public housing, effected all three arrests, all of which were for violating the state trespass after warning statute. The statute, Chapter 810.09, *Fla.Stat.* (1989), proscribes the willful entrance upon property after a warning has been issued by either the owner of the premises or an "authorized person." According to a "Special Agency Agreement," the Tampa Housing Authority, as "owner" of the City's public housing complexes, has authorized the Tampa Police Department and its officers to issue trespass warnings on behalf of the Authority. At the time of his citation and arrests, Mr. Daniel had active warnings from the Tampa

Police Department's X-Ray Squad. None of the warnings, however, were initiated by any of the thousands of residents of the public housing complexes or by the Tampa Housing Authority itself.

Mr. Daniel's first prosecution for trespass after warning stemmed from a January 25, 1991 protest against the Persian Gulf War. During the demonstration, Mr Daniel entered onto the grounds of a public housing complex and taped an anti-war sign onto one of the buildings. He was convicted of trespass after warning, and his conviction was affirmed on appeal.

Mr. Daniel was subsequently arrested for trespass after warning on both May 8, 1991 and November 29, 1991. In the first incident, members of the X-Ray Squad arrested Mr. Daniel as he passed out leaflets door-to-door, and in the second incident he was arrested again as he handed out leaflets in the common area of the same complex as he approached residences to canvass door-to-door. R5-97.

The state trial court dismissed both cases on the basis of both the First Amendment and the freedom of expression provision of the Florida Constitution.

C. The Proceedings Below.

Mr. Daniel filed his verified complaint and motion for preliminary injunction on June 18, 1992, alleging that both his and public housing residents' reciprocal First Amendment rights were violated by the City of Tampa when its police officers arrested him, while distributing leaflets, for the offense of trespass after warning. Mr. Daniel also alleged that the enforcement scheme employed by the X-Ray Squad and the Authority was void for vagueness under the Fourteenth Amendment. Petitioner alleged that the enforcement scheme provided unfettered discretion to police officers to: 1) determine without conferring with any resident, that a citizen was an unwelcome trespasser; 2) unilaterally issue a trespass warning; and 3) later arrest that citizen if he later returned to public housing. Finally, Mr. Daniel raised an overbreadth claim in recognition of residents' mutual First Amendment interests in receiving such communication.

The district court granted petitioner's motion for preliminary injunction on his First Amendment claim. Relying on *Martin v. Struthers*, 319 U.S. 141 (1943), the district court observed that the Supreme Court "created a right to distribute and receive literature as protected by the First Amendment...." *Daniel*, 818 F.Supp. at 1493. The district court observed that *Martin* also held that "the decision as to whether distributers of literature may lawfully call at a home belongs to the homeowner himself." *Id.*, citing *Martin*, at 148. The district court, finally, rejected the City's contention that residents of public housing "are not 'homeowners' and thus, are not entitled to this constitutional right." *Id.*

After denying petitioner's motion for summary judgment the trial judge granted respondents' motions for directed verdict at the close of petitioner's case-in-chief at the subsequent jury trial. In its later memorandum opinion, the trial court reasoned that neither Mr. Daniel nor the public housing residents were deprived of their First Amendment rights. *Daniel v. City of Tampa*, 843 F.Supp. 1445 (M.D. Fla. 1993). Expressing concern that enforcement of the trespass statute may not be the kind of regulation appropriately subject to First Amendment public forum analysis, the trial court nonetheless found that Tampa's public housing complexes were neither traditional nor designated public forum. *Id.* at 1447. Tampa Housing Authority property , therefore, is a nonpublic forum, where a restriction on speech need only be reasonable so long as there is no intention to discriminate on the basis of viewpoint. *Id.*

The trial judge found that enforcement of the state trespass after warning statute "easily meets that requirement." *Id.* at 1448. The court reasoned both that the interests in excluding drug dealers and addicts far outweigh Mr. Daniel's interest in leafletting, and that Mr. Daniel could use the nearby public sidewalk as an alternative forum. *Id.* The trial court also rejected petitioner's overbreadth challenge, finding that the statute affects First Amendment interests only minimally. *Id.* Finally, finding that the trespass statute was easily understood, the trial judge rejected Mr. Daniel's void for vagueness claim. *Id.*

The Eleventh Circuit affirmed in *Daniel v. City of Tampa*, 38 F.3d 546 (11th Cir. 1994). The court initially found that Tampa Housing Authority property is "government-owned" and dedicated to residential use. *Id.* at 548. The Authority restricts access by non-residents, the court continued, and one of the tools is enforcement of the state trespass after warning statute by the Tampa Police Department pursuant to its "special agency agreement" with the Authority. *Id.*

The court then observed that, in *Adderly v. Florida*, 385 U.S. 39 (1965), the Supreme Court upheld the arrests under Florida's malicious trespass statute of demonstrators protesting on the grounds of a county jail. In so holding, the *Adderly* court confirmed that the government may legitimately limit the use of its property to its own nondiscriminatory purposes. *Id.*, *citing Adderly*, 385 U.S. at 48. Assessing the Supreme Court's more recent public forum cases, the Eleventh Circuit reasoned, like the trial court, that Tampa Housing Authority property is neither a traditional nor designated public forum, but a nonpublic forum in which governmental regulation of speech need only be reasonable as long as it does not amount to an attempt to suppress particular viewpoints. *Id.* The *Daniel* court upheld the restriction under this standard. *Id.* at 550.

In a critical footnote, the *Daniel* court distinguished the Supreme Court's decision in *Martin v. Struthers*. According to the court,

> Daniel argues that enforcement of Florida's trespass after warning statute on Housing Authority property operates as a ban on his First Amendment right to canvass door-to-door and on the Housing Authority tenants' reciprocal right to receive information. *See Martin v. Struthers*, 319 U.S. 141, 63 S.Ct. 862, 87 L.Ed. 1313 (1943) (holding unconstitutional a city ordinance prohibiting door-to-door canvassing of private residents). We do not agree. The Court's opinion in *Martin* rests upon the premise that a city may not "substitute the judgment of the community for the judgment of the individual householder," and divest the homeowner of the decision of whether to speak with the canvasser. 319 U.S. at 144, 63 S.Ct. at 863. *This*

> *concern is not implicated where, as here, the regulated property is government-owned.*

Id. at 549, n. 7 (emphasis added).

In addition to rejecting petitioner's First Amendment claim, moreover, the Eleventh Circuit also upheld the trial judge's rejection of Mr. Daniel's void for vagueness claim. *Id.* at 550. Holding, like the trial court, that the statute clearly provides notice of prohibited conduct, the Eleventh Circuit also concluded that the Tampa police have virtually no enforcement discretion, as arrests may be made of any non-resident who is neither invited nor present on official business. *Id.* at 550-51. Finally, the court rejected petitioner's overbreadth claim on the rationale that he failed to demonstrate that he was deprived of his own First Amendment rights. *Id.* at 551, n.10.

REASONS FOR GRANTING THE WRIT

Certiorari is warranted because the Eleventh Circuit has created an unprecedented and troubling exception to the First Amendment principles this Court articulated over fifty years ago in *Martin v. Struthers*, 319 U.S. 141 (1943). By applying First Amendment public forum analysis to conclude that a public housing complex is a nonpublic forum entitled to the most minimal First Amendment protection, the Eleventh Circuit has overlooked the important communicative interests of both private citizens residing in public housing and the canvassers interested in engaging this audience. The court, in other words, failed to recognize that, whether treated as a "government-owned" public forum or not, public housing complexes are comprised of private residences.

In other words, assuming that public housing is subject to public forum analysis in the first place, public housing is unique. Unlike any other public forum, public housing also embraces the special First Amendment interests of private citizens who reside in that forum. No rationale supports the Eleventh Circuit's conclusion that citizens residing in government-subsidized public housing, or leafletters engaging them, do not enjoy the same First Amendment rights of the private homeowners described by the *Martin* court.

THE COURT SHOULD GRANT *CERTIORARI* BECAUSE THE ELEVENTH CIRCUIT HAS CREATED AN UNWARRANTED EXCEPTION, LIMITED ONLY TO RESIDENTS OF GOVERNMENT-SUBSIDIZED HOUSING, TO *MARTIN v. STRUTHERS*.

In *Daniel v. City of Tampa*, 38 F.3d 546 (11th Cir. 1994), the Eleventh Circuit created a public housing exception to *Martin v. Struthers*, 391 U.S. 141 (1943), which first extended First Amendment protection to door-to-door canvassers and the residents to whom canvassers offer their messages. The court's decision not only creates an unprecedented exception to *Martin*, but also squarely conflicts with a subsequent Supreme Court decision, *Tucker v. Texas*, 326 U.S. 517 (1946). The consequence of *Daniel* is that, once issued a trespass warning by a police officer, canvassers representing any interest, including religious groups, political campaigns, and social organizations, cannot visit Tampa's public housing residents in their homes without risking criminal prosecution. Residents are denied the opportunity, and according to *Martin* the First Amendment right, to decide for themselves whether canvassers may visit and, if so, which ones will be welcomed. As the Eleventh Circuit's opinion raises such fundamental First Amendment problems, and because the holding both directly clashes with *Tucker* and creates an unprecedented exception to *Martin*, *certiorari* is warranted.

In *Martin*, this Court assessed the constitutionality of a city ordinance providing:

> "It is unlawful for any person distributing handbills, circulars, or other advertisement to ring the doorbell, sound the door knocker or otherwise summon the inmate or inmates of any residence to the door for the purpose of receiving such handbills, circulars or other advertisements they or any person with them may be distributing."

391 U.S. at 142, *quoting* ordinance. The *Martin* Court invalidated the ordinance, holding that the First Amendment embraces both the right to distribute literature door-to-door, and "necessarily protects the right to receive it." *Id.* at 142.

The *Martin* Court began by recognizing that,

> For centuries it has been a common practice in this and other countries for persons not specifically invited to go from home to home and knock on doors or ring doorbells to communicate ideas to the occupants or to invite them to political, religious, or other kinds of public meetings. *Whether such visiting shall be permitted has in general been deemed to depend on the will of the individual master of each household, and not upon the determination of the community. In the instant case, the [City] has attempted to make this decision for all its inhabitants.* The question to be decided is whether the City, consistently with the federal Constitution's guarantee of free speech and press, possesses this power.

Id. at 141-142 (emphasis added). Stated another way, the *Martin* Court explained that it must weigh the reciprocal First Amendment rights of the canvasser and of the homeowner against the local government's goal of protecting the interests of the community, "whether particular citizens want that protection or not." *Id.* at 143. As this Court observed, the ordinance "substitutes the judgment of the community for the judgment of the individual householder." *Id.* at 144.

According to *Martin*, the stated governmental purposes for the ordinance - protection from annoyance and crime - were overshadowed by the importance under the First Amendment of the *mode* of

communication. "While door-to-door distributors of literature may be either a nuisance or a blind for criminal activities, they may also be useful members of society engaged in the dissemination of ideas in accordance with the best tradition of free discussion." *Id.* at 145. Pamphlets, according to this Court, are the "most effective instruments in the dissemination of opinion," and door-to-door distribution from home to home is "perhaps the most effective way" of distributing pamphlets to the public. *Id.* at 145, citing *Schneider v. Irvington*, 308 U.S. 147, 164 (1939). Moreover, as this Court explained, "door to door campaigning is one of the most accepted techniques of seeking popular support...," and is essential to "the poorly financed causes of little people." *Id.* at 146.

The *Martin* Court concluded with a discussion of an issue of special importance in this case, the effect of trespass after warning statutes. According to this Court:

> Traditionally the American law punishes persons who enter onto the property of another after having been warned by the owner to keep off. General trespass after warning statutes exist in at least twenty states, while similar statutes of narrower scope are on the books of at least twelve states more. *We know of no state which, as does the ...city ordinance, in effect makes a person a criminal trespasser if he enters the property of another without an explicit command from the owners to stay away.* The National Institute of Municipal Law Officers has proposed a form of regulation to its member cities which would make it an offense for any person to ring the bell of a householder who has appropriately indicated that he is unwilling to be disturbed. *This or any similar regulation leaves the decision as to whether distributors of literature*

> *may lawfully call at a home where it belongs - with the homeowner himself.*

Id. at 147-48 (emphasis added). With the exception of the Eleventh Circuit in this case, no later decision has denied the full protection of *Martin* to canvassers and residents of public housing. Given the *Martin* Court's particular hostility to the notion of governmental intervention in the householder's decision to welcome a canvasser, the fact of government "ownership" (more accurately, subsidization) of public housing should bolster, rather than undermine, the application of *Martin* in this case. Indeed, footnote seven of the Eleventh Circuit's opinion is especially mystifying in acknowledging the *Martin* Court's concern that the decision to welcome visitors to one's home must be assigned not to the government but reserved for each citizen, yet concluding that this concern "is not implicated where, as here, the regulated property is government-owned." 38 F.3d at 549, n.7.

In *Tucker v. Texas*, 326 U.S. 517 (1946), this Court concluded that the First Amendment protected a door-to-door canvasser visiting residents living in government-owned housing. According to the Court, the canvasser in *Tucker* was an

> ordained minister of the group known as Jehovah's Witnesses. In accordance with the practices of this group he calls on people from door to door, presents his religious views to those willing to listen, and distributes religious literature to those willing to receive it. In the course of his work, he went to the Hondo Navigation Village located in Medina County, Texas. The village is owned by the United States under a Congressional program which was designed to provide housing for persons engaged in National Defense activities. According to all indications the village was freely accessible and open to the public and had the characteristics of a

> typical American town. The Federal Public Housing Authority had placed the buildings in charge of a manager whose duty it was to rent the houses, collect the rents and generally to supervise operations, subject to over-all control by the Authority.

Id. at 518-19. Although the village appeared freely accessible to the public like any typical town, the manager employed by the Federal Housing Authority exercised his authority to prohibit canvassing without a permit issued in his sole discretion. *Id.* at 519.

Refusing both an order to cease his religious activities, and later to leave the village altogether, the door-to-door canvasser was arrested for violating a Texas statute making it unlawful for any "peddler or handler of goods or merchandise" to refuse to leave the premises after being so instructed. *Id.* at 518, 520.

The *Tucker* Court reversed the canvasser's conviction on First Amendment grounds. This Court first acknowledged the "close similarity" of the facts in *Tucker* to those of a case the Court decided on the same day, *Marsh v. Alabama*, 325 U.S. 501 (1946), in which the Court held that the managers of a "company town" could neither ban all distribution of religious literature in the town nor condition distribution on the issuance of a permit at their sole discretion. *Id.* According to the *Tucker* Court,

> The only difference between this case and *Marsh v. Alabama* is that here, instead of a private corporation, *the Federal Government owns and operates the village*. The difference does not affect the result. Certainly neither Congress nor Federal agencies acting pursuant to congressional authorization may abridge the freedom of press and religion safeguarded by the First Amendment. True, under certain circum-

> stances it might be proper for security reasons to isolate the inhabitants of a settlement, such as Honda Village, which houses workers engaged in producing war materials. But no such necessity and no such intention on the part of Congress or the Public Housing Authority are shown here.

Id. at 520 (emphasis added). To the extent the Texas statute was interpreted to authorize the canvasser's prosecution, the *Tucker* Court concluded, the statute was "an invalid abridgement of the freedom of press and religion." *Id.*

In *City of Ladue v. Gilleo*, __ U.S. __, 114 S. Ct. 2038 (1994), finally this Court none recently considered similar issues in evaluating a city's ban on householders' displays of signs on their own property. This Court found that, in banning residential signs, the city interfered with "an important and distinct medium of expression." *Id.* at 2045. Citing *Martin's* invalidation of an ordinance completely banning the door-to-door distribution of literature, the *City of Ladue* Court observed that its prior decisions "have voiced particular concern with laws that foreclose an entire medium of expression," even when those regulations are content- and viewpoint-neutral. *Id.* Also invoking *Martin*, the *City of Ladue* Court observed that residential signs are an "unusually cheap and convenient form of communication" that have no practical substitute for "persons of modest means." *Id.* at 2046. This Court recognized, finally, that,

> A special respect for individual liberty in the house has long been part of our culture and our law; that principle has special resonance when the government seeks to constrain a person's ability to *speak* there.

Id. at 2047 (citations omitted; emphasis in original). Although the *City of Ladue* Court addresses the First Amendment rights of residents, the principle is especially valid to the extent that *Martin* both recognizes a First Amendment right to *receive* information through the medium of door-to-door canvassing, and more important, holds as well that the

decision to welcome canvassers is a decision reserved for each individual citizen rather than the government.

In summary, *certiorari* is warranted to enable this Court to correct the Eleventh Circuit's serious departure from *Martin* and *Tucker*, aand to remedy its failure to acknowledge, unlike the *City of Ladue* court, the special significance of the mode of First Amendment communication involved in this case. The Eleventh Circuit applied standard public forum analysis, concluding that public housing is a nonpublic forum entitled only to the least exacting scrutiny. The critical flaw in the analysis, however, is the failure to recognize that public housing is truly a unique public forum, if a public forum at all. Unlike any other property owned or administered by the government, private citizens reside on this property. As this Court in *Martin* and *Tucker* made clear, residents and canvassers enjoy a well-established First Amendment right to engage in communicative activity. In failing to assess these more vital First Amendment interests, the Eleventh Circuit had created an indefensible exception to one of this Court's most fundamental First Amendment tenets.

CONCLUSION

For the reasons stated above, petitioner respectfully requests that this Court grant the Petition for Writ of Certiorari prayed for within.

Respectfully submitted,

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APPENDIX A - ELEVENTH CIRCUIT DECISION ON THE MERITS, 38 F.3d 546 (11th Cir. 1994)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 93-3356, 93-3553.

ANTHONY MARK DANIEL,

Filed: November 23, 1994.

Plaintiff-Appellant,

versus

CITY OF TAMPA, FLORIDA and
AUDLEY EVANS, Executive Director,
Tampa Housing Authority, in his
official capacity;
EDUARDO GONZALEZ, Chief, Tampa
Police Department, in his
official capacity;
NORMAN CRUTCHFIELD, Sgt., Tampa
Police Department, in his individual
and official capacities;
DAVID SLATTON, Officer, Tampa
Police Department, in his
individual and official capacities,

Defendants-Appellees.

On Appeal from the United States District Court for the
Middle District of Florida

Appendix A

BEFORE: KRAVITCH and DUBINA, Circuit Judges, and GIBSON*, Senior Circuit Judge.

KRAVITCH, Circuit Judge:

Whether Florida's trespass after warning statute enforced on Housing Authority property, Fla.Stat. Ch. 810.09, violates the First and Fourteenth Amendments to the United States Constitution is the issue presented in this appeal. We hold it does not and AFFIRM the district court's grant of Appellees', the City of Tampa, Florida (the "City") and Audley Evans, the Director of Tampa Housing Authority (the "Housing Authority"), motion for judgment as a matter of law pursuant to Fed.R.Civ.P. 50(a).

I.

The property at issue is government-owned and dedicated for residential use by eligible low income families. The Housing Authority's mission is to provide "a safe and healthy physical environment for eligible low income citizens."[1] To this end, because the Housing Authority property is often used by non-residents as a place to sell and use drugs,[2] access to the property is limited to residents, invited guests of residents, and those conducting official business.[3]

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[1] There are two public housing complexes in Tampa.

[2] Nearly 90% of those arrested on Housing Authority property are non-residents.

[3] Although access to the Housing Authority property is limited, the City-owned streets and sidewalk surrounding and intersecting with the Housing Authority property are open to the public.

Appendix A

Enforcement of this limited access policy is accomplished through enforcement of Florida's trespass after warning statute, which prohibits its persons from entering or remaining on a property after receiving a trespass warning.[4]

Pursuant to a special agency agreement, the Tampa Police Department is authorized by the Housing Authority to issue warnings to persons trespassing upon Housing Authority property. Once an individual is issued a trespass warning, he is placed on a list and is subject to arrest if found on Housing Authority property again.

Anthony Mark Daniel was issued a trespass warning in 1991 and was arrested for violating Florida's trespass after warning statute on three occasions.[5] He filed suit in federal district court alleging that his arrests violated his First Amendment rights, and that the Florida statute is void for vagueness under the Fourteenth Amendment.[6]

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[4] Fla.Stat. ch. 810.09 provides in pertinent part:

> (1) Whoever, without being authorized, licensed, or invited willfully enters upon or remains in any property other than a structure or conveyance as to which notice against entering or remaining is given ... by actual communication to the defendant ... commits the offense of trespass on property other than a structure or conveyance.
> (2)(b) If the offender defies an order to leave, personally communicated to him by the owner of the premises or by an authorized person ... he is guilty of a misdemeanor of the first degree ....

[5] On one occasion, Daniel was arrested after entering Housing Authority property in order to post a sign on a tree protesting America's involvement in the Persian Gulf War. The other two arrests were precipitated by Daniel's entrance upon Housing Authority property in order to distribute leaflets to residents.

[6] Daniel sought compensatory, permanent injunctive and declatory relief pursuant to 42 U.S.C. 1983 and 28 U.S.C. 2201.

Appendix A

At the close of Daniel's case, the district judge granted Appellees' motion for a directed verdict pursuant to Fed.R.Civ.P. 50(a), holding that Daniel's arrest did not abridge his First Amendment rights and that Florida's trespass after warning statute is not unconstitutionally vague. 843 F.Supp. 1445.

II.

We review a motion for a judgment as a matter of law de novo, applying the same standard that the district court applied when deciding whether to grant the motion. *Sherrin v. Northwestern Nat'l Life Ins. Co.*, 2 F.3d 373, 377 (11th Cir.1993). When considering a directed verdict motion, we view the evidence in the light most favorable to the non-moving party and "[i]f the facts and inferences point overwhelmingly in favor of one party, such that reasonable people could not arrive at a contrary verdict, then the motion was properly granted." *Carter v. City of Miami*, 870 F.2d 578, 581 (11th Cir. 1989).

As stated in *International Soc'y for Krishna Consciousness v. Lee*, _ U.S. _, _, 112 S.Ct. 2701, 2705, 120 L.Ed.2d 541 (1992) (citations omitted), "the government need not permit all forms of speech on property that it owns and controls." Thus, in *Adderley v. Florida*, 385 U.S. 39, 97 S.Ct. 242, 17 L.Ed.2d 149 (1966), the Supreme Court held constitutional the arrests, pursuant to Florida's malicious trespass statute, of demonstrators entering the county jail to protest segregation. The Court stated, "[t]he United States Constitution does not forbid a State to control the use of its own property for its own lawful nondiscriminatory purpose." *Id.* at 48, 87 S.Ct. at 247.

The constitutionality of government regulation of its own property depends upon the character of the property at issue. *See Perry Education Assoc. v. Perry Local Educators' Assoc.*, 460 U.S. 37, 44, 103 S.Ct. 948, 954, 74 L.Ed.2d 794 (1983).[7] For purposes of

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[7] Daniel argues that enforcement of Florida's trespass after warning statute on Housing Authority property operates as a ban on his first Amendment right to canvass door-to-door and on the Housing Authority tenants' reciprocal right to

(continued...)

Appendix A

First Amendment analysis, the Supreme Court has identified three types of government-owned property: the traditional public forum, the designated forum, and the non-public forum. *United States v. Kokinda*, 497 U.S. 720, 725-26, 110 S.Ct. 3115, 3119, 111 L.Ed.2d 571 (1990). A traditional public forum, such as a street or park, is one that has as "a principal purpose ... the free exchange of ideas." *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 800, 105 S.Ct. 3439, 3448, 87 L.Ed.2d 567 (1985). A designated forum is one which the government intentionally opens to the public for expressive activity. *Id.* at 802, 105 S.Ct. at 3449.

Government limitations on expressive activity in traditional public fora and designated public fora are subject to strict scrutiny; they must be narrowly tailored to serve a compelling state interest. *Id.* at 80, 105 S.Ct. at 3448. By contrast, "[a] nonpublic forum is `public property which is not by tradition or designation a forum for public communication,'" and limits on access to such need only be reasonable and not based upon a desire to suppress a certain view point. *Crowder v. Housing Authority of Atlanta*, 990 F.2d 586, 591 (11th Cir.1993) (quoting *Perry*, 460 U.S. at 46, 103 S.Ct. at 955.)

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[7] (...continued) receive information. *See Martin v. Struthers*, 319 U.S. 141, 63 S.Ct. 862, 87 L.Ed. 1313 (1943) (holding unconstitutional a city ordinance prohibiting door-to-door canvassing of private residences.) We do not agree. The Court's opinion in *Martin* rests upon the premise that a city may not "substitute the judgment of the community for the judgment of the individual householder," and divest the homeowner of the decision of whether to speak with the canvasser. 319 U.S. at 144, 63 S.Ct. at 863. This concern is not implicated where, as here, the regulated property is government-owned.

[8] In *Crowder*, 990 F.2d at 586, this court considered the types of fora of an auditorium and a library in an Atlanta public housing complex for First Amendment analysis. We concluded that although the auditorium is a designated public forum *for tenants*, the library located in the complex was not a designated public forum, even for residents, as it was not "ordinarily used for expressive purposes." *Id.* at 591.

Here, the district court concluded that the Housing Authority property is a nonpublic forum, and we agree. Daniel made no showing that the Housing Authority property was "by tradition or designation a forum for public communication" for non-residents.[8] *Id.* The official mission of the Housing Authority is to provided safe housing for its residents, no to supply non-residents with a place to disseminate ideas. Further, in practice, access to Housing Authority property is carefully limited to lawful residents, their invited guests, and those conducting official business. We therefore have little difficulty concluding that the Housing Authority property is a nonpublic forum. *See Kokinda*, 497 U.S. At 727, 110 S.Ct. at 3120 (sidewalk in front of post office is nonpublic forum "constructed solely to provide for the passage of individuals engaged in postal business"); *Sentinel Communications Co. v. Watts*, 936 F.2d 1189, 1204 (11th Cir. 1991) (interstate rest stop is nonpublic forum intended to provide motorists with a resting place as a safety mechanism for highways); *M.N.C. of Hinesville, Inc. v. United States Dep't of Defense*, 791 F.2d 1466, 1466, 1473 (11th Cir. 1986) (military base is nonpublic forum).

Because the Housing Authority property is a nonpublic forum, restrictions on access need only be content-neutral and reasonable. The first prong of this test is easily satisfied. There is simply no evidence that the police arrested Daniel because they disagreed with his message. Rather, the police arrested Daniel for the sole purpose of preventing unlawful trespass upon Housing Authority property.

In addition, we conclude that enforcement of the statute is a reasonable means of combatting the rampant drug and crime problems within the Housing Authority property. Enforcement of the statute has decreased the number of non-residents engaging in criminal activity on Housing Authority property. Further, Daniel has unlimited access to the City-owned streets and sidewalks adjacent to the housing complex, allowing him an alternative means for distributing information to residents.[9] *See United States v. Gilbert*, 920 F.2d 878, 886 (11th Cir.

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[9] The police are trained not to arrest someone who confines himself to the City-owned streets and sidewalks surrounding the Housing Authority property. Daniel himself protested on the public sidewalks on several occasions without incident.

1991) (availability of alternative channels of communication is factor bearing upon reasonableness of restriction). We therefore hold that Daniel's arrests for violating Florida's trespass after warning statute did not violate his First Amendment rights. *See Lee*, ___ U.S. at ___, 112 S.Ct. at 2708 (ban on solicitation in airport terminal, a nonpublic forum, is reasonable to prevent disruption of business and duress of passers-by); *Gilbert*, 920 F.2d at 885 (federal building is nonpublic forum; injunction prohibiting protesting inside building and portico reasonable because "government has a legitimate interest in maintaining aesthetics of the ... [b]uilding, and keeping the walkways near the building unobstructed.").

III.

Daniel also argues that the enforcement of Florida's trespass after warning statute on Housing Authority property is void for vagueness in violation of the Fourteenth Amendment. A statute is void for vagueness if it fails to define the criminal offense with sufficient clarity to provide an ordinary person with notice of the prohibited conduct or if the statute "fails to establish minimal guidelines to govern law enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357-58, 103 S.Ct. 1855, 75 L.Ed.2d. 903 (1983) (citation omitted).

Florida's trespass after warning statute is not void for vagueness. The statute provides citizens with clear notice of what is prohibited. *See Adderley v. Florida*, 835 U.S. 39, 42, 87 S.Ct. 242, 244, 17 L.Ed.2d 149 (1966) (Florida's malicious trespass statute not void because "[i]t is aimed at conduct of one limited kind... There is no lack of notice in this law, nothing to entrap or fool the unwary."). In addition, the Tampa police have virtually no discretion when enforcing the statute on the Housing Authority property: any person who is not a lawful resident of the property, an invited guest, or present on official business, is subject to arrest after receiving a warning.[10]

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[10] Daniel's argument that Florida's trespass after warning statute is overbroad is similarly without merit. A statute is overboard if it "reaches a substantial amount of constitutionally protected conduct." *Hoffman Estates v. Flipside,*

(continued...)

IV.

We hold that the Housing Authority property is a nonpublic forum with respect to non-residents for purposes of First Amendment analysis and that enforcement of Florida's trespass after warning statute on the property is a reasonable means of combatting drug and crime problems on the property. In addition, we hold that the enforcement of Florida's trespass after warning statute on the Housing Authority property is neither void for vagueness nor overboard. Accordingly, we AFFIRM the district court's grant of Appellees' motion for judgment as a matter of law.

AFFIRMED.

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10 (...continued) *Hoffman Estates, Inc.*,455 U.S. 489, 494, 102 S.Ct. 1186, 1191, 71 L.Ed.2d 362 (1982). Daniel has failed to show that his First Amendment rights have been abridged. Therefore, Florid's trespass after warning statute as enforced on Housing Authority property is not overbroad.

APPENDIX B - DECEMBER 17, 1993 DISTRICT COURT DECISION, 843 F. SUPP. 1445 (M.D. FLA. 1993)

IN THE UNITED STATES DISTRICT COURT
M.D. FLORIDA
TAMPA DIVISION

No. 92-838-CIV-T-17A

ANTHONY MARK DANIEL, Filed: December 17, 1993.

Plaintiff,

versus

CITY OF TAMPA, FLORIDA, and
AUDLEY EVANS, Executive Director,
Tampa Housing Authority, in his
official capacity,

Defendants.

MEMORANDUM

MORTON, Senior District Judge, Sitting by Assignment.

I. Introduction

Anthony Mark Daniel filed this lawsuit alleging violations of his First Amendment right of freedom of expression and Fourteenth

Appendix B

Amendment due process right of freedom from arrest and prosecution under an unconstitutionally vague enforcement scheme. His First Amendment claim brings up the issue of overbreadth.

II. Facts

The Tampa Housing Authority owns property administered by a board of directors to provide low income housing. There are two such public housing complexes; College Hill and Ponce de Leon. Access to this property is restricted to lawful residents, invited guests, and those on official business. Any non-resident group or individual wishing to solicit, picket, demonstrate, or engage in any other concerted activity on Housing Authority property must first obtain permission from the board of directors.

Florida Statute 810.09 states, in pertinent part:

> (1) Whoever, without being authorized, licensed, or invited, willfully enters upon or remains in any property other than a structure or conveyance as to which notice against entering or remaining is given, either by actual communication to the offender or by posting, fencing, or cultivation as described in 810.011, commits the offense of trespass on property other than a structure or conveyance.

This statute is enforced through the use of a list of individuals who have been issued a warning for trespassing on Housing Authority property. No one remains on this list more than twelve months after the last warning, but anyone on the list who trespasses again is subject to arrest.

The purpose of this enforcement scheme (as it applies to the Housing Authority) is to deter drug transactions. The Housing Authority properties have a history of drug problems. College Hill, for instance, accounts for a rate of narcotics arrests five times higher than

the rest of the city. Of these, more than 79% are committed by non-residents. Of the rest, more than half are illegitimate residents who squat in vacant Housing Authority apartments, drug addicts who leave behind their used syringes and other filth. Overall, nearly 90% of those arrested on Housing Authority property are non-residents or squatters.

The Tampa Police Department has established the X-Ray Squad to provide safety in the public housing complexes and improve community relations between the police and Housing Authority residents. Officers on the X-Ray Squad are trained in the enforcement of the Florida trespass-after-warning statute. They know that they cannot warn or arrest individuals who are (1) invited guests of Housing Authority property, (2) authorized to be on Housing Authority property, or (3) present on the city-owned streets, rights of way, sidewalks, or curbs which intersect or adjoin the public housing complexes.

Three times during the last two years, Daniel has been arrested for trespass after warning on Housing Authority property. At each arrest, Daniel had left the city-owned property and was standing either on the porch of an apartment complex or on the grounds next to an apartment complexes. The first of these charges occurred on 25 January 1991. Daniel and some others were engaged in a Gulf War protest on city-owned property adjacent to one of the housing complexes. When a police officer saw Daniel enter Housing Authority property and tape a sign to one of the buildings, he prepared a criminal report affidavit without placing Daniel under arrest. Daniel was later convicted of this charge. The second charge followed Daniel's trespass onto the porch of one of the apartments but later was dismissed. The third arrest occurred on 29 November 1991, when Daniel entered Housing Authority property and began handing out leaflets. Although given the opportunity to leave, he refused and was placed under arrest. This charge was also dismissed.

During this two-year period, Daniel has picketed, leafleted, and demonstrated without incident on city-owned property, sometimes immediately adjoining the public housing complexes. There is no evidence that the Tampa Police Department has any policy or practice of making arrests based upon the content of anyone's speech. In

fact, the TPD has an express policy requiring all police officers to be "diligent in protecting all citizens in the lawful exercise of their civil rights" and no one below the staff level has the authority to modify this policy.

II. Conclusions of Law

The court is not entirely persuaded that the enforcement of the trespass statute constitutes a time, place, and manner restriction subject to forum analysis. After all, no one here has alleged that Daniel's physical presence upon the property (which is all the statute prevents) is in itself expressive conduct within any conception to the First Amendment. But to the extent that Daniel's claim might be so construed, the court holds that the Housing Authority property is neither a traditional public forum nor a designated public forum. "The Government's ownership of property does not automatically open that property to the public." *United States v. Kokinda*, 497 U.S. 720,2725, 110 S.Ct. 3115, 3119, 11 L.Ed.2d 571 (1990). Furthermore, the property does not become a public forum just because the public is allowed access. *United States v. Grace*, 461 U.S. 171, 103 S.Ct. 1702, 75 L.Ed.2d 736 (1983). The Hosing Authority property is used for the private residence of low income individuals, not for the public exposition of ideas, so it is not a designated forum. And traditional public fora include only those places which "by long tradition or by government fiat have been devoted to assembly and debate," such as public streets and parks. *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 45, 103 S.Ct. 948, 954, 74 L.Ed.2d 794 (1983).

The Housing Authority has never allowed non-residents to solicit, canvass, or distribute literature on its properties, and the lack of a formal policy forbidding this activity does not amount to the designation of the property as a public forum. *International Society for Krishna Consciousness v. Lee*, _ U.S. _, _, 112 S.CT. 2701, 2706, 120 L.Ed.2d 541 (1992) ("[T]he government does not create a public forum by inaction"). On the contrary, "[t]he decision to create a public forum must be made by intentionally opening a nontraditional forum for public discourse." *Id.* at __, 112 S.Ct. at 2706 (internal quotes omitted).

Appendix B

Because the Housing Authority property constitutes a non-public forum, the restrictions imposed upon speech on the property need only be reasonable as long as they are not an effort to suppress the speaker's activity based upon its viewpoint content [sic]. There was no evidence presented during the plaintiff's proof that the City enforced the trespass after warning statute for any reason other than to prevent unlawful trespass. Accordingly, the court analyzes the restriction, such as it is, only for reasonableness and concludes that it easily meets that requirement.

Simply put, the public's compelling interest in keeping out dangerous drug dealers and addicts far outweighs Daniel's desire to post fliers or leaflets on Housing Authority property. Daniel is provided an alternative public forum only yards away, which he has used extensively and without incident in the past. To the extent that the enforcement of the trespass statute constitutes a time, place, or manner restriction, it is a slight one, and in any event amply justified.

Daniel's overbreadth challenge is also weak. This case involves a statute directed at unprotected behavior which has terrible consequences for society in general and for the health and safety of the residents of the housing complexes in particular. The trespass statute is a useful and effective device in curtailing the drug trade in these areas. It is just the kind of statute addressed in *Broadrick v. Oklahoma,* 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed. 2d 830(1973), when the Court admonished the lower courts to apply the overbreadth doctrine "sparingly" and as a last resort, particularly when the

> otherwise unprotected behavior that it forbids the state to sanction moves from "pure speech" toward conduct and that conduct - even if expressive - falls within the scope of the otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct. *Id.* at 615, 93 S.Ct. at 2917.

To succumb to an overbreadth challenge, this kind of statute must be substantially overbroad; it must reach a substantial amount of constitutionally protected conduct. When "judged in relation to [its] plainly legitimate sweep," *id.*, this statute quite clearly does very little to impinge upon First Amendment rights.

The void-for-vagueness challenge is misdirected at the enforcement scheme. This court understands *Kolender v. Lawson*, 461 U.S. 352, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983), and the rest of void-for-vagueness doctrine as requiring the statute itself to be unconstitutionally vague before it can fall. The enforcement scheme is to some extent subject to prosecutorial discretion, so common sense dictates that only the statute itself need convey to the public a sufficiently definite warning as to the proscribed conduct. Florida's trespass after warning statute easily meets these requirements. It is not void for vagueness because, when measured by common understanding and practice of the English language, the statute quite clearly forbids one to trespass upon the subject property.

II. Conclusion

Daniel's claims against the City of Tampa must fail. Since no reasonable jury could have found in his favor, the court granted the defendants judgment as a matter of law at the end of the plaintiff's proof.

An appropriate order will be entered

ORDER

In accordance with the memorandum contemporaneously filed, this case is dismissed.

APPENDIX C - APRIL 8, 1993 DISTRICT COURT DECISION, 818 F. Supp. 1491 (M.D. FLA. 1993)

IN THE UNITED STATES DISTRICT COURT
M.D. FLORIDA
TAMPA DIVISION

No. 92-838-CIV-T-17(B)

ANTHONY MARK DANIEL, Filed: April 8, 1993.

Plaintiff,

versus

CITY OF TAMPA, FLORIDA, et al.,

Defendants.

ORDER ON REPORT AND RECOMMENDATION

KOVACHEVICH, District Judge.

This cause came to be heard before the Honorable Thomas G. Wilson, United States Magistrate Judge, on November 20, 1992, upon Plaintiff's Motion for Preliminary Injunction. Judge Wilson had the authority to hear this motion pursuant to 28 U.S.C. 636(b)(1), and Rule 72 of the Federal Rules of Civil Procedure.

After considering all documents of record and the arguments of counsel, and being otherwise fully advised on the premises, Judge

Wilson recommended that the Court ADOPT Plaintiff's Motion for Preliminary Injunction. Judge Wilson thereby recommended that the City be enjoined from arresting the Plaintiff under the trespass-after-warning statute, Fla.Stat. 810.09 (1989), while he is engaged in door-to-door political expression between the hours of 7:00 A.M. and 9:00 P.M. in the College Hill and Ponce de Leon properties owned by the Tampa Housing Authority.

Pursuant to Rule 6.02, Rules of the United States District Court for the Middle District of Florida, the parties had ten (10) days after service to file written objection to the proposed findings and recommendation, or be barred from attacking the factual findings on appeal. *Nettles v. Wainwright*, 677 F.2d 404 (5th Cir. 1982)(en banc). Both parties have filed timely[1]
objections with this Court.

This Court has reviewed the findings of fact set out in the REPORT and RECOMMENDATION. With respect to this review, this Court must make a de novo determination in accordance with the rules, after review of the specific written objections by the litigants. 28 U.S.C. 636(b)(1); Rule 72(b) Fed.R.Civ.P.; *United Steelworkers of Am., AFL-CIO v. New Jersey Zinc Co., Inc.*, 828 F.2d 1001, 1005 (3rd Cir. 1987). The District Court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." 28 U.S.C. 636(b)(1)(C).

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[1] Plaintiff's objections to Magistrate's Report and Recommendation included an argument that Defendant's objections were untimely. However, this Court finds that under Rule 4.20 and the Federal Rules of Civil Procedure the Defendant's objections are timely. Rule 4.20 and F.R.C.P. Rule 6(a) and 6(e) require that whenever a period of time prescribed is less than eleven (11) days and there has been service upon a party by mail, the following shall be excluded in the computation of time: the day of the act and intermediate Saturdays, Sundays, and legal holidays. Additionally, three days shall be added when the party is served by mail. Hence, the Defendants had until December 9, 1992 to file timely objections. The Defendants properly filed their objections on December 7, 1992.

Appendix C

FACTS

On November 20, 1992, Magistrate Wilson issued a report and recommendation which recommended that this Court approve a preliminary injunction for Plaintiff, Daniel. Plaintiff is a member of the National Peoples Democratic Uhuru Movement, a black rights organization that deals primarily with the abrogation of democratic and constitutional rights of poor and working class African people. Plaintiff wishes to espouse the viewpoints of this organization in the College Hill and Ponce de Leon public housing units of the Tampa Housing Authority.

However, College Hill and Ponce de Leon have a serious problem with drugs and other crimes. Significantly, much of the crime problem there is caused by people who do not live in the public housing areas. In order to combat the crime problem in the areas and the effects of the uninvited outsiders, the Housing Authority delegated to the Tampa Police Department its right to invoke Florida's trespass-after-warning provision, Fla. Stat. 810.09 (1989). Florida Statute 810.09 provides in pertinent part:

> (1) Whoever, without being authorized, licensed, or invited, willfully enters upon or remains in any property other than a structure or conveyance as to which notice against entering or remaining is given, either by actual communication to the offender or by posting, fencing, or cultivation as described in 810.011, commits the offense of trespass on property other than a structure or conveyance.
> (2)(a)....
> (b) If the offender defies an order to leave, personally communicated to him by the owner of the premises or by an authorized person, .. he is guilty of a misdemeanor of the first degree, punishable as provided in 775.082 or 775.083.

Pursuant to this statute the Tampa Housing Authority delegated to the Tampa Police Department the power to warn uninvited and unauthorized persons to leave the public housing areas, and if the individuals refuse to leave, arrest them for violating the statute.

Since May 1991, the Plaintiff has been charged three times with violating the trespass-after-warning provision.[2] However, Plaintiff argues that the enforcement scheme used to apply the trespass-after-warning statute is overbroad and violates the First Amendment rights of Housing Authority residents to receive communications. He further alleges that the enforcement scheme is vague and thus offends the Fourteenth Amendment's Due Process Clause. Plaintiff moves this Court to issue a Preliminary Injunction prohibiting the Defendants, and their agents, from arresting him while espousing his views on Tampa Housing Authority property.

Magistrate Wilson determined this issue on November 20, 1992. The Magistrate recommended that this Court approve a preliminary injunction, enjoining the Defendants, and their agents, from arresting the Plaintiff under the trespass-after-warning statute, Fla.Stat. 810.09 (1989), based on a warning issued by the police or the Housing Authority, while he is engaged in door-to-door political expression between the hours of 7:00 A.M. and 9:00 P.M. in the College Hill and Ponce de Leon properties owned by the Tampa Housing Authority.

STANDARD OF REVIEW

A preliminary injunction should only be entered when the moving party has sustained the burden of satisfying the following four-prong test: (1) a substantial likelihood that plaintiff will prevail on the merits, (2) a substantial threat that plaintiff will suffer irreparable injury if [the] injunction is not granted, (3) that the threatened

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[2] The Plaintiff had previously been arrested twice on charges arising from his presence in the College Hill area. On February 2, 1989, he was arrested during a civil disturbance, and charged with inciting a riot and unlawful assembly. On July 31, 1990, the plaintiff was arrested for loitering and prowling while he was passing out handouts. Neither charge was prosecuted.

injury to plaintiff outweighs the threatened harm the injunction may do to defendant, and (4) that granting the preliminary injunction will not disserve the public interest. *Johnson v. United States Department of Agriculture*, 734 F.2d 774, 781 (11th Cir. 1984). However, the remedy is considered extraordinary and drastic. *Canal Authority of State of Florida v. Callaway*, 489 F.2d 567, 572-573 (5th Cir. 1974).[3] Therefore, if the plaintiff fails to meet any of the foregoing prerequisites the motion is properly denied. *United States v. Jefferson County*, 720 F.2d 1511, 1519-1520 n.21 (11th Cir. 1983).

OBJECTIONS

Both Defendants and Plaintiff filed objections to the Magistrate Judge's report and recommendation. Defendants object to the finding that the Plaintiff had satisfied the first two elements of the preliminary injunction test. Defendants argue that Plaintiff has failed to prove (1) that there is a substantial likelihood that the plaintiff will prevail on the merits, and (2) that there is a substantial threat that the plaintiff will suffer irreparable injury if the injunction is not granted.

First, this Court will address Defendant's argument that Plaintiff has not proven a substantial likelihood of success on his First Amendment claim regarding his right to engage in door-to-door canvassing in public housing areas. The Court finds the Supreme Court decision in *Martin v. Struthers*, 319 U.S. 141, 63 S.Ct. 862, 87 L.Ed. 1313 (1943) most persuasive. In *Martin v. Struthers* the United States Supreme Court created a right to distribute and receive literature as protected by the First Amendment of the United States Constitution. Justice Black delivered the opinion that door to door distribution of circulars is essential to the poorly financed causes of little people. *Id.*, 319 U.S. at 146, 63 S.Ct. at 865. Consequently, the Supreme Court held that the decision as to whether distributors of literature may lawfully call at a home belongs to the homeowner himself. *Id.*, 319 U.S.

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[3] The Eleventh Circuit adopted as precedent all case law of the Fifth Circuit prior to September 30, 1981. *Bonner v. City of Prichard, Ala.*, 661 F.2d 1206 (11th Cir. 1981)(en banc).

at 148, 63 S.Ct. at 866. Defendants further argue that residents of the Ponce de Leon and College Hill areas are not "homeowners" and thus, not entitled to this constitutional right. However, this Court finds the *Martin v. Struthers* case precedent sufficient to find the Plaintiff has indeed demonstrated a substantial likelihood of success on this issue.

Defendant's second argument that Plaintiff has not proven a substantial threat of irreparable injury if the injunction is not granted is equally unconvincing. A violation of a First Amendment right cannot be remedied by money damages. *Cate v. Oldham*, 707 F.2d 1176, 1188 (11th Cir. 1983). Accordingly, a plaintiff who has demonstrated a likelihood of success on a First Amendment claim has ordinarily established irreparable injury as well. *Id.* at 1188. An alleged constitutional infringement will often alone constitute irreparable harm sufficient to warrant granting of a preliminary injunction. *Goldie's Bookstore, Inc. v. Superior Court of California*, 739 F.2d 466, 472 (9th Cir. 1984).

Plaintiff objects to several factual findings and legal conclusions of the Magistrate Judge. The following facts were set forth in the Report and Recommendation, and are specifically adopted by this Court:

1. Almost 90% of the people arrested at College Hill and Ponce de Leon are not legitimate residents.

2. A list of the persons who have been warned to leave Housing Authority property is maintained for a period of twelve months.

3. X-Ray Squad members are trained that they cannot arrest individuals who are: invited guests of residents; authorized to be on the property by the Housing Authority; or present on the City-owned streets, rights-of-way, or sidewalks or curbs which intersect or adjoin the public housing areas.

4. The police do not interfere with Plaintiff's speech as long as he remains on City-owned property, such as streets or sidewalks.

5. The Housing Authority is a non-public forum.

6. Due to lack of factual development, it cannot be concluded at this time that Plaintiff has shown a likelihood of success on a claim that the restrictions were invalid because they were designed to cut off an unfavorable viewpoint.

7. It has not yet been sufficiently developed as to whether Plaintiff's arrests have been effected in order to prevent him from exercising his First Amendment Rights.

This Court is confident that the Magistrate Judge properly came to these conclusions of fact. However, Plaintiff's remaining objections require some examination. Plaintiff objects to the finding that, "the plaintiff acknowledges that public housing authorities may delegate to municipal police officers the authority under 810.09 [Fla. Stat.] to issue the initial warning to leave the premises, as was done here (Doc. 44, p.8)." Report, 4. The Court agrees that Plaintiff may not have conceded that delegation is valid; however, Florida case law suggests otherwise. In *Fox v. State*, 580 So.2d 313 (Fla. 3rd DCA 1991), the Third District Court of Appeal held that the manager of a public housing project could authorize a municipal police officer to issue both the trespass warning and effect the subsequent arrest for trespass after warning. Similarly, the Attorney General of Florida, in opinion 90-68 (Aug. 17, 1990), concluded that a municipal housing authority may predesignate on-duty municipal police officers to order persons to leave the housing authority's property under 810.09.

Plaintiff objects to the finding that ".... the parties seem to accept that, under the statute, if an individual has been warned to leave and he subsequently returns to the property, he may be arrested." Report, 4. The Court respectfully submits that Plaintiff may not have accepted that, under the statute, if an individual has been warned to leave and he subsequently returns to the property, he may be arrested; however, the plain meaning of the statute is sufficient to uphold this finding, regardless of Plaintiff's acceptance.

Plaintiff objects to the finding that he has failed to demonstrate a substantial likelihood of prevailing on his First Amendment claims that he has a right to distribute written material and engage in other protected expressive conduct in public housing areas, such as common

areas, other than the actual entrances to apartments. Further, Plaintiff argues that he has demonstrated a substantial likelihood of success on his Fourteenth Amendment Due Process claim that the enforcement scheme is void-for-vagueness. The Court finds these objections without merit. Accordingly, it is

ORDERED that the report and recommendation, dated November 20, 1992, be ADOPTED and incorporated herein, with exceptions previously noted; Plaintiff's Motion for Preliminary Injunction is GRANTED; and Defendants, and their agents, be enjoined from arresting the Plaintiff under the trespass-after-warning statute, Fla. Stat. 810.09 (1989), based upon a warning issued by the police or the Housing Authority, while he is engaged in door-to-door political expression between the hours of 7:00 A.M. and 9:00 P.M. in the College Hill and Ponce de Leon properties owned by the Tampa Housing Authority.

DONE and ORDERED.

APPENDIX D - JANUARY 20, 1995 ELEVENTH CIRCUIT DECISION ON SUGGESTION OF REHEARING EN BANC

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 93-3356, 93-3553.

ANTHONY MARK DANIEL, Filed: January 20, 1995.

Plaintiff-Appellant,

versus

CITY OF TAMPA, FLORIDA and
AUDLEY EVANS, Executive Director,
Tampa Housing Authority, in his
official capacity;
EDUARDO GONZALEZ, Chief, Tampa
Police Department, in his
official capacity;
NORMAN CRUTCHFIELD, Sgt., Tampa
Police Department, in his individual
and official capacities;
DAVID SLATTON, Officer, Tampa
Police Department, in his
individual and official capacities,

Defendants-Appellees.

On Appeal from the United States District Court for the
Middle District of Florida

Appendix D

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

Before: KRAVITCH and DUBINA, Circuit Judges, and GIBSON*, Senior Circuit Judge.

PER CURIUM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

Phillis Kravitch
UNITED STATES CIRCUIT JUDGE

* Hon. Floyd R. Gibson, Senior U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

(2)

No. 94-1771

Supreme Court, U.S.
FILED
MAY 22 1995
CLERK

In The
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

ANTHONY MARK DANIEL,

Petitioner,

v.

CITY OF TAMPA, FLORIDA;
AUDLEY EVANS, Executive Director,
Tampa Housing Authority,
in his official capacity,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondents, CITY OF TAMPA, FLORIDA and AUDLEY EVANS, Executive Director, Tampa Housing Authority, respectfully restate the questions presented as follows:

I. WHETHER THE ELEVENTH CIRCUIT CORRECTLY APPLIED THE WELL DEVELOPED SUPREME COURT PRECEDENT IN THE AREA OF FIRST AMENDMENT FORUM ANALYSIS.

II. WHETHER THE OWNER OF A PUBLIC HOUSING COMPLEX HAS THE SAME RIGHT AS THE OWNER OF A PRIVATE APARTMENT COMPLEX TO ENFORCE TRESPASS LAWS ON ITS PROPERTY, PARTICULARLY WHERE ADEQUATE ALTERNATIVE AVENUES FOR EXPRESSIVE ACTIVITIES EXIST.

PARTIES TO THE PROCEEDINGS BELOW

Plaintiff:	Anthony Mark Daniel
Defendants:	City of Tampa and Audley Evans, in his official capacity as Executive Director of the Tampa Housing Authority

SUPREME COURT RULE 29-1
STATEMENT OF INTERESTED PARTIES

Joel F. Dubina
United States Circuit Judge

Floyd R. Gibson
Senior United States Circuit Judge

Phyllis A. Kravitch
United States Circuit Judge

Honorable L. Clure Morton
Senior United States District Judge

Honorable Elizabeth A. Kovachevich
United States District Judge

Honorable Charles R. Wilson
United States Magistrate Judge

Honorable Thomas G. Wilson
United States Magistrate Judge

Anthony Mark Daniel
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Defendant/Respondent

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Audley Evans, in his official
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Defendant/Respondent

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No. 94-1771

In The
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

ANTHONY MARK DANIEL,

Petitioner,

v.

CITY OF TAMPA, FLORIDA;
AUDLEY EVANS, Executive Director,
Tampa Housing Authority,
in his official capacity,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE SUPREME COURT:

The Respondents, City of Tampa, Florida (hereinafter "the City") and Audley Evans, in his official capacity as Executive Director of the Tampa Housing Authority (hereinafter "the Housing Authority"), respectfully request that this Court deny the Petition for Writ of Certiorari

submitted by Petitioner, Anthony Mark Daniel (hereinafter "Daniel").

STATEMENT OF THE CASE AND FACTS

Respondents respectfully submit that the following pertinent facts, most of which were specifically referenced in the decisions of the trial court and the Eleventh Circuit, do not appear in Daniel's recitation of the facts:

1. The Housing Authority owns the property on which Daniel was arrested for trespass after warning. The Housing Authority property is lawfully dedicated for residential use by low income individuals. The Housing Authority's mission is to provide "a safe and healthy physical environment for eligible low income citizens." [R2-50-4].

2. There is a serious drug problem on the Housing Authority property. [R5-76]. For example, one of the Housing Authority's public housing complexes has a rate of narcotics arrests which is five times higher than the rest of the City. The majority of people who commit criminal violations, including drug-related crimes, on Housing Authority property are non-residents. [R5-80]. Nearly 90% of those arrested on Housing Authority property are non-residents.

3. In order to deter crime, particularly drug transactions on Housing Authority property, access to the Housing Authority property is limited to lawful residents, invited guests, and those conducting official business through the enforcement of Florida's trespass after warning statute, § 810.09, *Florida Statutes*.

4. Use of the trespass after warning statute helps deter non-resident drug dealers and non-resident customers of

drug dealers from using Housing Authority property for the illegal narcotics transactions. [R2-50-195, 291]. Enforcement of the statute has made a significant impact upon the visible narcotics trade which takes place on Housing Authority property. [R2-50-291].

5. The City has established a special unit of police officers known as the "X-Ray Squad" to provide safety in public housing complexes and to improve community relations between the police and Housing Authority residents.

6. Police officers serving on the X-Ray Squad are trained in the enforcement of the Florida trespass after warning statute. They know that they cannot warn or arrest individuals who are (1) invited guests of Housing Authority residents, (2) authorized to be on Housing Authority property, or (3) present on the City-owned streets, sidewalks, rights-of-way and curbs which intersect and adjoin the Housing Authority property. [R5-50, 73].

7. The City-owned sidewalks, streets, rights-of-way and curbs which intersect and adjoin the Housing Authority property allow Daniel access to the Housing Authority residents, without requiring him to be physically present on Housing Authority property. [R2-50-26, 69].

8. When Daniel engages in expressive activity on the City-owned sidewalks and streets which adjoin or intersect Housing Authority property, he cannot be arrested for trespass after warning. In fact, Daniel has picketed, leafletted and demonstrated on the City property directly adjacent to the Housing Authority property without incident. [R5-49-50, 74, 103].

9. Daniel is subject to arrest for trespass after warning when he is present on Housing Authority property without authorization, whether he is engaging in expressive activity

or not. [R2-50-316]. Daniel is not be subject to arrest for trespass after warning, however, if he is invited on Housing Authority property by a resident or is otherwise authorized to be there. [R2-50-193, 289].

10. Daniel presented no evidence that the City's police department has a policy or practice of making arrests based upon the content of anyone's speech.

REASONS FOR DENYING THE WRIT

The decision under review was properly decided by the court of appeals. The court below correctly applied the well-developed Supreme Court precedent in the area of First Amendment forum analysis in concluding that enforcement of the Florida trespass after warning statute on Housing Authority property did not violate the First Amendment.

ARGUMENT

Rather than creating "an unprecedented and troubling exception to the First Amendment principles," as the Petitioner argues, the court of appeals correctly applied the well-developed Supreme Court precedent in the area of First Amendment forum analysis. *See, e.g. Cornelius v. NAACP Legal Defense & Education Fund*, 473 U.S. 788, 800 (1985); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44 (1983).

Both the district court and the court of appeals correctly concluded the Housing Authority property was a non-public forum. This conclusion was based upon the record evidence that: (1) the Housing Authority has dedicated its property for use in providing a safe and healthy physical environment for low income citizens; and (2) access to Housing Authority property is restricted to residents, invited guests and those conducting official business. Moreover, as the Eleventh Circuit pointed out, Daniel made no showing that the Housing Authority has ever opened or designated its property for expressive activities by non-residents.

Daniel asserts that, since individuals reside on the Housing Authority property, public housing is "a unique public forum." The Housing Authority property generally consists of residential apartment complexes surrounded by lawns. The Housing Authority property is intersected and bounded by City-owned streets and sidewalks. Those streets and sidewalks are traditional public fora. However, their presence does not transform the Housing Authority property itself into a traditional public forum any more than any other street transforms all privately-owned property adjacent to it into a traditional public forum. *See United States v. Kokinda*, 497 U.S. 720, 727 (1990) ("[t]he presence of sidewalks and streets within the [military] base did not require a finding that it was a public forum").

Similarly, the mere fact that individuals reside on the Housing Authority property cannot transform the property into a public forum. *See Chapman v. Thomas*, 743 F.2d 1056, 1059 (4th Cir. 1984) (residential areas of dormitories located on state university campus were nonpublic fora), *cert. denied*, 471 U.S. 1004 (1985); *Shopco Distributing v. Commanding General*, 885 F.2d 167, 172-3 (4th Cir. 1989). If anything, the concept of a home is antithetical to the notion of a public forum.

If, as Daniel claims, the Housing Authority is a "unique public forum," the quiet and tranquility of this residential area would be at the mercy of all advocates of religious, social or political persuasion. The residents would have little or no recourse against such things as mass demonstrations and political rallies in their yards. Not only would the Housing Authority be denied the same right to determine the use of its property enjoyed by private property owners, but Housing Authority residents would not be afforded the same privacy protections as individuals living in private residences, simply because they live in public housing.

In short, Daniel's assertion that the court of appeals erred in failing to treat the Housing Authority as a "unique public forum" should be rejected. Acceptance of that argument would represent a radical departure from this Court's well developed forum analysis precedent.

Having concluded that the Housing Authority property is a non-public forum, the court of appeals then examined whether enforcement of the Florida trespass after warning statute on Housing Authority property was content-neutral and reasonable. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. at 46.

As to the first factor, the Eleventh Circuit observed that Daniel failed to present any evidence that he had been

arrested for trespassing because of a disagreement with his viewpoint. Instead, as the district court also found, Daniel's arrests were effected solely to prevent unlawful trespass.

The court of appeals also concluded that enforcement of the Florida trespass after warning statute on Housing Authority property was reasonable, given the evidence establishing: (1) the residential nature of the Housing Authority property[1]; (2) the rampant drug and crime problem that pervades the area; (3) the effectiveness of enforcement of the Florida trespass after warning statute in helping the Housing Authority to combat the drug and crime problem on its premises; and (4) the availability of closely adjoining City-owned sidewalks for leafletting, handbilling, and other expressive activities.

In short, the court of appeals correctly concluded that the Housing Authority property is a non-public forum and that enforcement of the Florida trespass after warning statute on Housing Authority property is reasonable and not an effort to suppress speech based upon its content.

Contrary to the Petitioner's argument, the Eleventh Circuit did not create an exception to *Martin v. Struthers*, 319 U.S. 141 (1943), limited only to public housing residents. For several reasons, *Martin* is fundamentally distinct from this case.

In the first place, the law challenged in *Martin* was aimed directly at expressive activities. The ordinance challenged in that case prohibited door to door solicitation.

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[1] The Housing Authority's interest in providing safe living conditions for its residents is certainly greater than the Postal Service's interest in regulating solicitation in *United States v. Kokinda*, 497 U.S. 720 (1990), or the city's interest in eliminating visual clutter in *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984).

Here, the challenged statute, § 810.09, *Florida Statutes*, is not directed at activities which are inherently expressive. Rather, it prohibits unauthorized physical presence on the property of another. *Cf. Martin*, 319 U.S. at 147-48 (referring to the alternative of trespass laws punishing persons who enter property after being warned to keep off); *Breard v. City of Alexandria, La.*, 341 U.S. 622, 644 (1951).

This Court has rejected constitutional challenges to the enforcement of laws which forbid certain conduct for legitimate reasons unrelated to the suppression of free expression, even where conduct violating the laws was undertaken for communicative purposes. *See, e.g. United States v. O'Brien*, 391 U.S. 367 (1968); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984).

More importantly, the Housing Authority, unlike the city in *Martin*, is not acting as a sovereign to foreclose expressive activity on privately-owned property. Instead, the Housing Authority is acting in a proprietary capacity, enforcing a facially neutral trespass law on property it owns.[2] *See Intern. Soc. for Krishna Consciousness v. Lee*, ____ U.S. ____, ____, 112 S. Ct. 2701, 2705, 120 L.Ed.2d 541 (1992) ("[w]here the government is acting as a proprietor, managing its internal operations, rather than acting as a lawmaker with power to regulate or license, its action will not be subjected to the heightened review to which its actions as a lawmaker may be subject").

Owners of private property, including private apartment complexes, have the right to enforce criminal trespass laws

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[2] The Petition refers to the Housing Authority property as "government-subsidized public housing." However, this characterization is somewhat misleading. As the district court found, the Tampa Housing Authority owns the subject property. [Petition, Appendix "B," p. 10a].

on their premises. *See, e.g. Hall v. Com. of Virginia*, 188 Va. 72, 49 S.E.2d 369, *appeal dismissed*, 335 U.S. 875 (1948). There is no reason why the Housing Authority, while acting in a proprietary capacity, should not enjoy the same property rights as the owner of a private apartment complex.

As the Court recognized in *Adderley v. Florida*, 385 U.S. 39 (1966):

> Nothing in the Constitution of the United States prevents Florida from even-handed enforcement of its general trespass statute. . . .
>
> The State, no less than a private owner of property, has the power to preserve the property under its control for the use to which it is lawfully dedicated. . . .
>
> [The petitioners'] argument has as its major unarticulated premise the assumption that people who want to propagandize protest or views have a constitutional right to do so whenever and however and wherever they please. That concept of constitutional law was vigorously and forthrightly rejected in two of the cases petitioners rely on. . . . We reject it again. The United States Constitution does not forbid a State to control the use of its own property for its own lawful nondiscriminatory purposes.

385 U.S. at 47-8.

Finally, the unique facts of this case make it wholly distinguishable from *Tucker v. Texas*, 326 U.S. 517 (1946) and *Marsh v. Alabama*, 326 U.S. 501 (1946). *Tucker* and *Marsh* involved bars to expressive activities in entire towns, at least portions of which were freely accessible and open to

the public. *See Breard v. City of Alexandria, La.*, 341 U.S. at 643 ("[i]n neither case was there dedication to public use but it seems fair to say that the permissive use of the ways was considered equal to such dedication").

Here, the Housing Authority property is a relatively confined area and access to the property is restricted to residents, invited guests and other authorized individuals. Moreover, in contrast to *Tucker* and *Marsh*, the Housing Authority has made no effort to bar expressive activities in all areas, including traditional public fora such as adjoining sidewalks and streets.

In this case, closely adjoining sidewalks and rights-of-way are available for leafletting, handbilling and other expressive activities. Indeed, the evidence established that no effort was made to arrest Daniel on a number of occasions when he engaged in expressive activities in those areas. Because the Housing Authority's public housing complexes are relatively confined areas, the ability to handbill and leaflet on the adjoining sidewalks constitutes an adequate and practical alternative to door to door solicitation. In *Martin*, *Tucker* and *Marsh*, no similar alternative channels for communication were readily available. In summary, this case turns on its own unique facts, which render it wholly distinguishable from *Martin*, *Tucker* and *Marsh*.

CONCLUSION

The Court should decline to exercise jurisdiction over this matter because the case presents no issue appropriate for the Court's review, and because the court of appeals' ruling was not in error.

Respectfully submitted,

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